

## Direitos humanos e acesso ao mercado

Danielle Mendes Thame Denny\*\*

### ABSTRACT

This paper describes one example of how ordinary national rules can provide essential compliance regulation to assess human rights abuses. It argues that sometimes purely competitiveness, commercial or even domestic common-law doctrine between private, non-state actors can be in fact human rights claims even if never pleaded as such internationally or in courts. The example studied is the new consumptive demand clause by the Trade Enforcement and Trade Facilitation Act of 2015 a ground-breaking change in a national American law that impacts the whole world. Because of that all importers to America need to be able to prove that do not use forced labor in their supply chains, so they are compelled to have a chain of custody to backtrack the production up to the raw material. In response to this new scenario, new challenges arise like the uneven distribution of compliance costs between different capabilities companies from different locations. This Article sustain that legal studies have lot to gain from expanding the scope of human rights analyses to business practices but alert about the possibility of misinformation. The methodology chosen was the descriptive and normative, using case study techniques and documentary, legislative and bibliographic research.

**Keywords:** Human Rights Governance. Sustainable Development Goals. Global Value Chains. Market Access. Trade. Forced Labor.

### RESUMO

Este artigo descreve como leis nacionais internas podem ser regulamentação para o cumprimento e verificação de abusos de direitos humanos internacionalmente. A doutrina concorrencial, comercial, administrativa ou mesmo processual entre atores privados, não estatais, podem, de fato, conter reivindicações de direitos humanos, mesmo que nunca sejam assim abertamente anunciadas internacionalmente ou em tribunais. O exemplo estudado é a cláusula de demanda de consumo da lei estadunidense de execução comercial e facilitação de comércio de 2015, uma mudança inovadora em uma lei nacional americana que afeta o mundo inteiro. Por causa dela, todos os importadores para os EUA precisam provar que não usam trabalho forçado em suas cadeias de suprimentos, então são obrigados a ter uma cadeia de custódia para auditar a produção até a matéria-prima. Em resposta a este novo cenário, novos desafios surgem como a distribuição desigual de custos de conformidade entre diferentes empresas de diferentes locais e com capacidades diversas. Este artigo sustenta que os estudos jurídicos têm muito

\* Recebido em 27/05/2018  
Aprovado em 20/06/2018

\*\* Doutorando em Direito Ambiental Internacional pela Universidade Católica de Santos, com bolsa da Coordenação de Aperfeiçoamento de Pessoal de Nível Superior. Mestre em Comunicação na Contemporaneidade, pela Faculdade Cásper Líbero. Com especializações em: Diplomacia Econômica, pela Universidade Estadual de Campinas; Direito Tributário, pela Pontifícia Universidade Católica de São Paulo; e Política pela Escola de Governo da Universidade de São Paulo. Bacharel em Direito pela Pontifícia Universidade Católica de São Paulo. Professora universitária na Fundação Armando Álvares Penteado e na Universidade Paulista. E-mail: danielle.denny@gmail.com

a ganhar com a expansão do escopo das análises de direitos humanos para as práticas de negócios, mas alerta sobre a possibilidade de desinformação. A metodologia escolhida foi a descritiva e normativa, utilizando técnicas de estudo de caso e pesquisa documental, legislativa e bibliográfica.

**Palavras-chave:** Governança de Direitos Humanos. Objetivos de Desenvolvimento Sustentável. Cadeias Globais de Valor. Acesso a Mercados. Comércio. Trabalho Forçado.

## 1. INTRODUCTION

“High performance with high integrity”<sup>1</sup> is the key to global business success nowadays. Besides being morally wrong, human rights neglecting can cost market access in the current governance system oriented by corporate social environmental governance, which measures ethics broadly through governmental, private, national, foreign, mandatory or voluntary strategies. In this scenario consumer boycotts, reputational losses and responsibility for noncompliance with expected conduct are not the only risks to be assessed.

In terms of competition, for example, more and more companies suffer with the lack of fair play, therefore themselves demand for stringent regulations. Most of global players are American and European corporations but their national regulation and private norms tend to impact the market as a whole regardless of international borders. An example is the consumptive demand clause by the Trade Enforcement and Trade Facilitation Act of 2015<sup>2</sup> a ground-breaking change in a national American law that impacts the whole world.

Because of this rule all importers to America need to be able to prove that do not use forced labor in their supply chains, so they are compelled to have a chain of custody to backtrack the production up to the raw material. International organizations and civil society have an important role to play in this system of governance because in today's global-value-chain economy, profita-

bility increases the more and better integrated are the various capillary production points around the world.

However, if this global logistic, on one hand provides gains of specialization, economy of scale and exploitation of local comparative advantages, on the other hand it presents the challenge of compliance with global ethical standards. To sell products and services to high standards markets such as the European and American, companies are subject to the limits of tolerance of these markets, if not for a moral or legal responsibility, by private and marketing requirements. Therefore, without meeting certain standards, companies can be denied access to markets and face reputational risks, what can represent effective losses<sup>3</sup>.

Globalization has transformed the international context in several ways, but mainly by increasing the role of companies and private entities. This type of company can in the national and global economy be more important than many States<sup>4</sup>. In this way, its actions directly affect the lives of thousands of people, thus regarding the effectiveness or not of human rights and sustainable development goals<sup>5</sup>. In the same way, if commercial activity can be used to generate wealth, create jobs and distribute income, it can, on the contrary, pressure that in search of the highest income, the expenses with salaries are the smallest possible and the standards of guarantees are curtailed, thus compromising the maintenance of the dignity of the worker.

As is to be expected in the face of the greater economic power of companies, many national governments no longer exercise their capacity to demand from companies acting in their markets that they comply with social and environmental standards. Still, as trade is done in the global market, regulations of other countries may require certain conformities and private initiatives such as private certifications may create non-mandatory requirements. This non-binding characteristic is only in principle because if the criteria are not met, they can hinder the access of the products and services to

1 BAUMANN-PAULY, Dorothée; NOLAN, Justine. *Business and human rights: from principles to practice*. Abingdon: Oxon; New York: Routledge, 2016. p. 88.

2 UNITED STATES OF AMERICA. Trade Enforcement and Trade Facilitation Act of 2015. Disponível em: <<https://www.congress.gov/114/plaws/publ125/PLAW-114publ125.pdf>>.

3 ROBERTS, Peter W.; DOWLING, Grahame R. Corporate reputation and sustained superior financial performance. *Strategic Management Journal*, v.23, n.12, p.1077-1093, 2002.

4 DENNY, Danielle Mendes Thame; GRANZIERA, Maria Luiza Machado; RUDIGER, Dorothee Susanne. Direitos humanos e acesso a mercados. *Revista de Direito Econômico e Socioambiental*, v.8, n.3, p.377-409, 2018.

5 UNITED NATIONS. *Agenda 2030*. 2015. Disponível em: <[http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E)>.

the more consolidated markets or block a significant amount of price differential that would be possible (charging more from superior quality those that shows compliance with standards).

The intricate point to engage business with human rights and social environmental sustainability is to quantify the costs and benefits, in other words risk assessment and mitigation. However, there are methodological inconsistencies in this questioning because it is a trans disciplinary and complex issue, which demands a normative, non-empirical approach because the causal link is often unclear between an action and its positive or negative impact on the reputation and value of a company for example. In addition, there is a moral option that requires, intrinsically, a certain level of long-term ethical commitment of the company to maintain the business model ahead.

Consequently, legal studies have lot to gain from expanding the scope of human rights analyses to a more business oriented direction taking into consideration its practical ways to manage the interdependence and to deal with the diversity of regulation therefore recognizing that international organizations and civil society have an important role to play in the governance of this system. This paper is not arguing that it should start to serve this purpose; rather that it already does so. Legal scholars only need to start systematically to recognize this fact and build upon it to better articulate the overlap between human rights claims and corporate claims. Indeed, this is the approach taken by many nations around the world through a more explicit incorporation of the language of primary rights into business and of business governance practices into laws and regulation.

## 2. GLOBAL VALUE CHAIN

The period of globalization in the 1800s benefited from steam power and international peace to put in place a profitable and effective way of transporting goods across borders. Some nations were in the position of taking advantage of this process and established their global dominance. This was the era designated “Great Divergence”<sup>6</sup> when countries would gain from explo-

ring their differences as competitive advantages. The new globalization though is driven by information technology, which made possible the cheap and accurate movement of ideas across borders.

This enabled the labor-intensive work to move abroad where human resources are cheaper and social environmental regulation weaker. Business became structured in global value chains – GVCs<sup>7</sup> and propelled by a rapid industrialization process of a handful of developing nations. This is what can be denominated the “Great Convergence”<sup>8</sup>. This economic interdependence, with fast-paced technological changes and common social environmental challenges make the world more unpredictable, and hard to control but at the same time has auspicious effects, including to developing countries.

GVCs offer tremendous economic potential. GVCs are especially key for developing countries since GVCs enable the use of intermediate products from abroad and take over the part of the production process that suits it best without having to build an entire industry. Integration in international production networks is thus regarded a promising growth strategy. [...] In 2010, more than 25% of global gross exports were double-counted. In a world of GVCs, gross exports are therefore no longer sufficient for studying trade patterns as they mask the underlying structure and overstate export performance<sup>9</sup>.

Rich and developing countries alike face unprecedented policy challenges. The traditional international menace of declared war between nations became unlikely to most countries apart from some few exceptions<sup>10</sup>. Most places, however, struggle with more urgent threats coming from disruptive non-state forces, such as terrorist attacks. And are also constantly defied by problems associated with diffuse, long term and resis-

6 BALDWIN, Richard. *The great convergence: information technology and the new globalization*. Cambridge, Massachusetts: Belknap Press; Harvard University Press, 2016. p. 12.

7 UN FORUM ON SUSTAINABILITY STANDARDS. *Policy brief: fostering the sustainability of Global Value Chains (GVCs)*. p. 4. Disponível em: <<https://unfss.org/2017/04/11/fostering-the-sustainability-of-global-value-chains-gvcs/>>. Acesso em: 11jun.2017.

8 BALDWIN, Richard. *The great convergence: information technology and the new globalization*. Cambridge, Massachusetts: Belknap Press; Harvard University Press, 2016. p. 12.

9 UN FORUM ON SUSTAINABILITY STANDARDS. *Policy brief: fostering the sustainability of Global Value Chains (GVCs)*. p. 4. Disponível em: <<https://unfss.org/2017/04/11/fostering-the-sustainability-of-global-value-chains-gvcs/>>. Acesso em: 11jun.2017.

10 HITCHCOCK, William I.; LEFFLER, Melvyn P.; LEGRO, Jeffrey W. (Org.). *Shaper nations: strategies for a changing world*. Cambridge, Massachusetts: Harvard University Press, 2016.

tant causes, like human rights abuses. “Clashes between multinational enterprises and nation-states might be growing in frequency and intensity, evoking responses from both the public and the private sectors”<sup>11</sup>.

Consumer boycotts, reputational losses and responsibility for noncompliance with expected conduct are not the only risks to be assessed. In terms of competition, more and more companies among themselves demand fair play. Therefore, “high performance with high integrity”<sup>12</sup> must become the foundational goals of global business. In this context, the traditional international level in which relations between sovereign states normally take place have been complemented by other levels of governance, such as transnational and supranational.

In this new context, states share power with other institutions such as corporations, local governments, civil society organizations, and individuals. The sharp distinction by source of law is overcome by the efficiency of rulings coming from different origins. Some laws are made a single nation’s legislature and can regulate the actions internationally strongly and coercively than some treaties that are the traditional international law and represent the agreement among a plurality of governments. For a plurality of reasons, the demarcation between national law and international law is increasingly flimsy.

Formal international law is stagnating in terms both of quantity and quality. It is increasingly superseded by ‘informal international lawmaking’<sup>13</sup> involving new actors, new processes, and new outputs, in fields ranging from finance and health to Internet regulation and the environment. On many occasions, the traditional structures of formal

lawmaking have become shackles.<sup>14</sup>

National norms and legal relationships with pure national efficacy are rare, as well as the exclusive application of international law in a watertight manner. On the contrary, the interdependence of the national scope with the international and the public with the private sector is increasing at the same time as the complexity of the analysis. Procedures adopted voluntarily by private entities may have application nationally and, potentially; influence the legal order of other states. This would be the case of a transnational retailer that by demanding compliance to a set of standards ends up impacting the whole global supply chain that has also to comply.

Thus, with globalization, the cheapness of goods transport and the easy information exchange in real time, the production model has changed. To minimize fixed operating costs, companies outsource the suppliers of products and services using temporary contracts as demand is sought. In this way, large companies count on a vast network of possible partners to be activated to produce, transport, distribute, and market their products and services. With this, a network is formed that links individuals to small and large companies, surpassing national and foreign governments. Then the company that best manages global production logistics wins the most.

In this condition, international trade by itself can be a strong engine to promote inclusive economic growth, poverty reduction, elevation of labor standards, and a reasonable and sustainable use of natural resources. The World Trade Organization normally focus on the liberalization of international trade, but the main challenge at present time is not protectionism any more, but the “resurgent ethos of liberal capitalism”<sup>15</sup>, that can be more unrestrained, and disguise wrongdoers behind national and subnational norms. The main problem is to handle ‘social and environmental dumping’<sup>16</sup> that has been put

11 VERNON, Raymond. *In the hurricane's eye: the troubled prospects of multinational enterprises*. Cambridge, Massachusetts: Harvard University Press, 2001.

12 BAUMANN-PAULY, Dorothee; NOLAN, Justine. *Business and human rights: from principles to practice*. Abingdon: Oxon; New York: Routledge, 2016. p. 88.

13 The authors here cited define informal international lawmaking as: “[c]ross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization (process informality), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies) (actor informality) and/or which does not result in a formal treaty or other traditional source of international law (output informality)” PAUWELYN, Joost; WESSEL, Ramses A.; WOUTERS, Jan. When structures become shackles: stagnation and dynamics in international lawmaking. *European Journal of International Law*, v.25, n.3, p.22, 2014.

14 PAUWELYN, Joost; WESSEL, Ramses A.; WOUTERS, Jan. When structures become shackles: stagnation and dynamics in international lawmaking. *European Journal of International Law*, v.25, n.3, p.1, 2014.

15 RUGGIE, John G. *The social construction of the UN Guiding Principles on Business and Human Rights: corporate responsibility initiative working paper No. 67*. Cambridge: John F. Kennedy School of Government; Harvard University, 2017. p. 3.

16 ANDERSON, Kym. Contributions of the GATT/WTO to global economic welfare: empirical evidence. *Journal of Economic Surveys*, v.30, n.1, p.56–92, 2016.



in place along the global chain production. Companies and countries take advantage of places where labor force and the natural resources can be exploited recklessly to produce cheaper products and services, and because of that, experiment better revenues than their competitors that comply with higher social and environmental standards.

### 3. TRADE BARRIERS AND GENERAL EXCEPTIONS

Differently from the past when barrier to free trade were basically only Tax Law, applicable on the borders, now they can originate from internal national rules, such as the national labor and environmental laws of a country. In the case study that will be analyzed in this paper, it is a trade barriers originated in national rule that determines barriers that kick in at the border, if the product to be imported does not meet certain standards, it's barred from entering the territory of the USA. Some of these non-tax barriers are regulated in the multilateral system of international trade by the treaties Technical Barriers to Trade -TBT and Sanitary and Phytosanitary Measures - SPS.

With the surge of preferential agreements, new rules were introduced in the international trade system: investment, competition, environment and labor. There was a shift from the proliferation of tariff measures, which are already under control in the multilateral trade system, to regulatory measures, which must deserved careful consideration since they might represent another attempt of protection to the developed world and can have, overall, a deep disruptive effect on trade policies. The best example of this regulatory barriers is presented by the WTO Technical Barriers to Trade and Sanitary and Phytosanitary Agreements which aim at ruling, on a multilateral level, over measures that are created to protect human, animal or plant life or health, or the environment, but have become the 21st century model of new protectionist measures – the new regulatory barriers to trade.<sup>17</sup>

Labor rules can be a case of this kind of renewed protection to the develop world and can have this disruptive effect on trade policies. To clear these differences it is important to promote a better understanding of the real logic behind WTO technical barriers and sani-

tary and phytosanitary barriers: what is discrimination and what is the real need of protection. Both treaties (TBT and SPS) encourage members states to recognize each other's public procedures for assessing whether a product conforms to their internal regulation or not. Both agreements give the countries the right to take measures when necessary for the protection of human, animal or plant life or health, or the environment, but conditioned to appropriate levels, and if applied in a manner that do not constitute means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, do not disguising restriction to free international trade.

The TBT Agreement covers regulatory barriers to trade, of three types technical regulations, standards and conformity assessment procedures. The technical regulations are mandatory product characteristics, processes, or production methods that require compliance otherwise state administrative sanctions are applicable. The standards are voluntary rules, guidelines or characteristics for products, processes, and production methods defined by a recognized body, each member state nominates their focal points that can be private entities that provides. The last type the conformity assessment procedures are procedures used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled<sup>18</sup>. They can be testing, verification, inspection and certification, which confirm that products fulfill the requirements laid down in regulations and standards, they have to be fair and equitable.

Either technical regulations or standards may be about terminology, symbols, packaging, marketing, or labeling and both types apply to product, process and production method. The difference between a standard and a technical regulation lies in compliance; while conformity with standards is voluntary, technical regulations are mandatory<sup>19</sup>. But member states according to the Code of Good Practice (Annex 3) should ensure that their central government standardizing bodies adopt the standards. TBT requires governments to “take such reasonable measures as may be available to

17 VIEIRA, Andreia Costa; THORSTENSEN, Vera Helena. *Regulatory barriers to trade: TBT, SPS and sustainability standards*. São Paulo: VT, 2016. p. 8. Disponível em: <<http://bibliotecadigital.fgv.br/dspace/handle/10438/17663>>. Acesso em: 11jun.2017.

18 WTO. *Agreement on technical barriers to trade*. Disponível em: <[http://www.wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm](http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm)>. Acesso em: 11set.2017.

19 VIEIRA, Andreia Costa; THORSTENSEN, Vera Helena. *Regulatory barriers to trade: TBT, SPS and sustainability standards*. São Paulo: VT, 2016. p. 17. Disponível em: <<http://bibliotecadigital.fgv.br/dspace/handle/10438/17663>>. Acesso em: 11jun.2017.

them to ensure that local government and non-governmental standardizing bodies within their territories [...] accept and comply with this Code of Good Practice”<sup>20</sup>; in other words, members are responsible to ensure that ‘non-governmental entities within their territories abide by disciplines laid out in the multilateral level.

On a regional and subnational level also there are innumerable intra borders regulations not applicable by the national custom authority that can add complexity to the multilateral trading system and the continuous promotion of universal, rules-based, open, transparent, predictable, inclusive, non-discriminatory and equitable dispute of resolution system as well as meaningful and ethical trade liberalization. This kind of internal ruling can be a practice applied only by a Federal State, or a region or a company. California for example has a stringent state regulation about sustainable standards to renewables the Low Carbon Fuel Standard<sup>21</sup>. To be considered renewable energy the ethanol producer that want to sell there has to provide thoroughly demonstration that the production was made in conformity of what California demands.

And on the borders measures can be taken to raise barriers to trade in exceptional cases. In the multilateral mechanism of international trade, imports of products from countries that do not comply to socio-environmental sustainability standards can be object to adjustment mechanisms at the border. This is perfectly justifiable by Article XX of the GATT<sup>22</sup>. This type of measure would be, for example, the imposition of an import tax or even the requirement of a certain amount of certificates or permits from importers. Such border adjustments may be legally feasible.

#### Article XX: General Exceptions.

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any

contracting party of measures:[...]

(b) necessary to protect human, animal or plant life or health; [...]

(c) relating to the products of prison labour; [...]

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;<sup>23</sup>

It is legally feasible, but hard to be implemented, because Article XX (b) provides for a two-step test to determine whether a measure is justified under its provision. The party invoking Article XX (b) shall establish: (1) that the policy relating been invoked is included in the spectrum of policies intended to protect human, animal or plant life or health; the first element of the test involves the scope public health policies as well as environmental policies. This condition is relatively easy to fill.

For example, in Thailand - cigarettes, Thailand sought to justify its restrictions on cigarette imports by saying that it aimed to protect the public from harmful ingredients of imported cigarettes, and to reduce the consumption of cigarettes in Thailand. The Panel recognized that smoking constituted a serious risk to human health and that measures to reduce cigarette consumption therefore fell within the scope of the policies considered under Article XX (b)<sup>24</sup>

The second element is the requirement of “necessity” this is more difficult to establish. The Panel Thailand - Cigarettes has established that a measure is “necessary” according to Article XX (b) only when there are no alternative measures compatibles with the GATT or less incompatible whose employment could reasonably be expected to be applied, to achieve its objectives.

In summary, the Panel considered that there were a number of measures consistent with the General Agreement that were reasonably available to Thailand to control the quality and quantity of cigarettes smoked and that, together, could achieve the health policy objectives that the Thai government seeks by restricting the import of cigarettes in a manner inconsistent with Article XI: 1. The Panel therefore considered that Thailand’s practice of allowing the sale of domestic cigarettes while not allowing the importation of foreign

20 WTO. *Agreement on technical barriers to trade*. Disponível em: <[https://www.wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm](https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm)>. Acesso em: 11set.2017.

21 CALIFORNIA GOVERNMENT. California Air Resources Board. *Low carbon fuel standard*. Disponível em: <[http://www.energy.ca.gov/low\\_carbon\\_fuel\\_standard/](http://www.energy.ca.gov/low_carbon_fuel_standard/)>. Acesso em: 28maio2018.

22 ESTY, Daniel. *Greening the GATT: trade, environment, and the future*. Washington: Peterson Institute for International Economics, 1994.

23 WTO. *Agreement on technical barriers to trade*. Disponível em: <[https://www.wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm](https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm)>. Acesso em: 11set.2017.

24 UNCTAD. *General exceptions, interpretation and application of Article XX: course on dispute settlement in international trade, investment and intellectual property*. 2003. p. 57. Disponível em: <[http://unctad.org/en/Docs/edmmisc232add33\\_en.pdf](http://unctad.org/en/Docs/edmmisc232add33_en.pdf)>.

cigarettes was an inconsistency with the General Agreement because it was not 'necessary' under Article XX (b) <sup>25</sup>

However even if based on the exceptions of Art XX of the GATT, there may be the risk that they may be understood as protectionist measures and therefore challenged in a panel in the dispute settlement body within the World Trade Organization. Ideally, the multilateral trade body itself should carry out the metaregulation activity and, thus, contribute to the establishment of homogeneous and internationally accepted criteria. Nevertheless, the WTO has been reluctant to act on the socio-environmental issue that has been included in the agenda only via panels.

#### 4. BEHIND BORDERS MEASURES AND VOLUNTARY STANDARDS

The international trade of the XXI is different from the trade of the century. XX, whose main themes were trade liberalization through the overthrow of tariff barriers and the articulation through large international agreements with mandatory targets that proved difficult to achieve. Mega preferential agreements have replaced multilateral ones and the concern with barriers is not focused on taxation. The impediments to free trade are much more complex and difficult to negotiate in this kind of negotiation, since they often do not even necessarily present themselves as international trade measures, they are within national legal systems, they are administrative measures adopted within the borders, Behind Borders Measures, "the wolves of protectionism disguised under new sheepskin"<sup>26</sup>.

Many unethical, asymmetrical, business-as-usual measures can arise from the unequal negotiation basis experienced in Mega External Preferential Trade Agreements, such as the Trans-Pacific Partnership (TPP), Trans-Atlantic Trade and Investment Partnership (TTIP) and the Europe Association of Southeast Asian

Nations Free Trade agreement (EU-ASEAN). These initiatives are outside the scope of the World Trade Organization, don't follow the logic of regional agreements and can be very unbalanced. That's why Vera Thorstensen considers the main scope nowadays to the multilateral trade negotiations is to looking forward to implementing coherence, convergence and cooperation to the trade regulatory system <sup>27</sup>.

Each country in the exercise of its sovereign power can dispose of its public policies in the way that it understands more convenient. Political, and economic issues are increasingly demanding a more comprehensive legal environment requiring an increasingly creative and coordinated public private articulation to achieve social and environmental sustainability. Labeling in this context can potentially become a factor important to be demanded specially for certain products with high labor intensity or consuming large chunks of natural inputs. Labels if well managed can give governments, companies and consumers valuable information, especially when they are related to attributes not immediately apparent in the final product <sup>28</sup>.

Governments, companies and consumers can then draw on environmental, social, and other values in making purchasing decisions, and doing so put pressure on producers to conform to these values. In terms of labeling, in addition to the WTO negotiations, there is a growing trend that will have an impact on international trade and which supplements the performance of States that is voluntary labels and certification to comply with environmental and social standards in a large variety of products <sup>29</sup>, with the increasing participation of non-state actors such as International Social and Environmental Accreditation and Labelling Alliance.

25 UNCTAD. *General exceptions, interpretation and application of Article XX: course on dispute settlement in international trade, investment and intellectual property*. 2003. p. 57. Disponível em: <[http://unctad.org/en/Docs/edmmisc232add33\\_en.pdf](http://unctad.org/en/Docs/edmmisc232add33_en.pdf)>.

26 VIEIRA, Andreia Costa; THORSTENSEN, Vera Helena. *Regulatory barriers to trade: TBT, SPS and sustainability standards*. São Paulo: VT, 2016. Disponível em: <<http://bibliotecadigital.fgv.br/dspace/handle/10438/17663>>. Acesso em: 11jun.2017.

27 HORSTENSEN, Vera; MESQUITA, Alebe. *Coerência, convergência e cooperação regulatória nos capítulos de barreiras técnicas ao comércio e medidas sanitárias e fitossanitárias do Acordo Transpacífico*. Brasília: IPEA, 2016. p. 34. Disponível em: <[http://www.ipea.gov.br/portal/index.php?option=com\\_content&view=article&id=28762&catid=390&Itemid=406](http://www.ipea.gov.br/portal/index.php?option=com_content&view=article&id=28762&catid=390&Itemid=406)>.

28 CASTRO, Douglas. Escassez hídrica e direito internacional econômico: o Brasil como protagonista na transferência de água para regiões áridas. *Revista de Direito Internacional*, v.13, n.1, p. 12, 2016. Disponível em: <<https://www.publicacoesacademicas.uniceub.br/rdi/article/view/3949>>. Acesso em: 11jun.2018.

29 DERANI, Cristiane; DALMARCO, Arthur Rodrigues. Ecolabeling, eficiência energética e a disciplina dos PPM's na OMC: ecolabels de eficiência energética e sua consistência com as provisões do GATT e Acordo TBT. *Revista de Direito Internacional*, v.13, n.2, p. 97, 2016. Disponível em: <<https://www.publicacoesacademicas.uniceub.br/rdi/article/view/3971>>. Acesso em: 11jun.2018.

WTO rules were created to regulate public rules, but a 'new kind' of rule has become a regulatory barrier to trade – sustainability standards, which reflect a contemporary international relations on global governance – plurality of actors, plurality of institutions and plurality of norms and rules governing international society and consequently international trade. Even though private standards are not legally mandatory, they might become a de facto mandatory rule since a majority of large buyers imposes them to producers. The new words on rules are harmonization and equivalence<sup>30</sup>.

Voluntary sustainability standards - VSS are those created by private entities, such as companies, associations and other non-governmental organizations that are not mandatory<sup>31</sup>, but can be backed by governments or accepted as proof of compliance to achieve a kind of public waiver. Therefore even being voluntary, the non-compliance with them might mean exclusion from a specific market, or clients. They might become de facto mandatory if government accept them as a condition to enter the market or a majority of large buyers demand them on their global value chain.

There has been a significant increase in unregulated voluntary standards<sup>32</sup> from a group of entities, NGOs, and private companies. There is no legal compulsion for compliance, the entities involved in the setting of VSS have no power to compel implementation, but the compulsion for compliance is wielded by broad range of private adopters (for example a transnational company supply chains) that see value in their suppliers implementing these standards. The market power of the adopters renders the de facto effectiveness, the standard is set by a "commercial (for example a firm) or non-commercial (for example an NGO or industry organization) private body and is adopted by a (usually commercial) private firm or organization, and conformity is assessed by a private auditor and the standard is enforced

by a private certification body<sup>33</sup>. They have become one of the most common contemporary trade barriers, but, unless governments back those standards, they do not fall under the TBT or the SPS agreements<sup>34</sup>.

Regulatory gaps, unbalanced articulations and misaligned incentives risk the financial stability and compromise the implementation of human rights and social development goals. As pointed out by Jorge Viñuales, more adaptive legal systems have to be put in place "law, when considered as a regulative instrument, becomes a technology that can be fine-tuned and optimized to reach a stated purpose"<sup>35</sup>. Laws can have this transformative effect of incentivize what is wanted in the future and discourage what it is not. The present technological and environmental abrupt changes call for policies of this kind.

Legal changes have to take into consideration the power of business and finance adequate practices to the emergence, experimentation and refinement of new technologies and processes. Unfortunately these type of socio environmental adaptive regimes are deeply grounded on sunk investments and incentives policies, free trade does not alone lead to sustainable actions. On the contrary, social environmental responsible production tends to cost more. This especially when the aim is to increase the speed of investments and cut stages through capacity building making those who don't have access to energy, water or sanitation for example gain this access directly with the newest and more efficient socio and ecofriendly technologies.

Bearing in mind that in this new scenario a third-party manufacturer contracted abroad as a chain link of the production if it is caught violating human rights and sustainable development goals this can jeopardize the full value of the large contractor's brand and indefinitely jeopardize the economic performance of the great economic agent globally. The Spanish clothing

30 VIEIRA, Andreia Costa; THORSTENSEN, Vera Helena. *Regulatory barriers to trade: TBT, SPS and sustainability standards*. São Paulo: VT, 2016. p. 17. Disponível em: <<http://bibliotecadigital.fgv.br/dspace/handle/10438/17663>>. Acesso em: 11jun.2017.

31 AMARAL, Manuela Kirschner do. *Padrões privados e outras fontes não tradicionais de governança no âmbito dos regimes de mudança climática e multilateral de comércio da OMC: conflito ou convergência?* 2014. PhD, Universidade de Brasília, Brasília, 2014. Disponível em: <[http://repositorio.unb.br/bitstream/10482/16504/1/2014\\_ManuelaKirschnerDoAmaral.pdf](http://repositorio.unb.br/bitstream/10482/16504/1/2014_ManuelaKirschnerDoAmaral.pdf)>.

32 UN FORUM ON SUSTAINABILITY STANDARDS. *Policy brief: fostering the sustainability of Global Value Chains (GVCs)*. Disponível em: <<https://unfss.org/2017/04/11/fostering-the-sustainability-of-global-value-chains-gvcs/>>. Acesso em: 11jun.2017.

33 HENSON, Spencer; HUMPHREY, John. Understanding the complexities of private standards in global agri-food chains as they impact developing countries. *The Journal of Development Studies*, v.46, n.9, p.1628–1646, 2010.

34 VIEIRA, Andreia Costa; THORSTENSEN, Vera Helena. *Regulatory barriers to trade: TBT, SPS and sustainability standards*. São Paulo: VT, 2016. Disponível em: <<http://bibliotecadigital.fgv.br/dspace/handle/10438/17663>>. Acesso em: 11jun.2017.

35 VINUALES, Jorge E. *Foreign investment and the environment in international law: the current state of play*. Rochester, NY: Social Science Research Network, 2015. p. 63. Disponível em: <<https://papers.ssrn.com/abstract=2661970>>. Acesso em: 12jun.2017.



retailer Zara can be pointed out as example of the controversy. On one hand its business model depends on one of the broader international logistics structure. On the other hand it exposes the company to third-party threats like the use of child labor<sup>36</sup> and the unpaid manufacturing workers scandals. In this last case, shoppers at Zara stores found unusual tags left on garments, hidden in pockets left by workers from Turkish third-party manufacturer Bravo Tekstil, which produced clothes for Zara, and other big international brands like Next and Mango. The company went bankrupt overnight in July 2016, and its workers were not paid<sup>37</sup>.

With these multijurisdictional regulatory challenges, political and civil society pressures become forceful in the operation of these companies. Then, to show corporate governance and the adoption of codes of ethics, an alternative is submitting the operation to sustainability reports and standards compliance. Being part of voluntary commitments such as the Global Compact<sup>38</sup> that declare in conformity with the compact principles and allow verification of their compliance with the commitments voluntarily determined by independent third parties in a transparent manner, thus enabling reporting, third-party monitoring and auditing.

## 5. NEW CONSUMPTIVE DEMAND CLAUSE

American law in the Section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307) prohibits the importation of “merchandise mined, produced or manufactured, wholly or in part, in any foreign country by forced or indentured child labor – including forced child labor”. Such merchandise is subject to exclusion and/or seizure, and may lead to criminal investigation of the importers.

19 U.S. Code § 1307 - Convict-made goods; importation prohibited

All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part

in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision. “Forced labor”, as herein used, shall mean all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily. For purposes of this section, the term “forced labor or/and indentured labor” includes forced or indentured child labor.

The consumptive demand clause by the Trade Enforcement and Trade Facilitation Act of 2015<sup>39</sup> repeals the “consumptive demand” exception in 19 U.S.C. § 1307 which had tolerated the importation of forced labor-produced goods if those goods were not produced in such quantities in America enough to meet the consumptive demands of the United States. Now the new legal text is clear to ban any kind of tolerance to forced labor imported goods:

(Sec. 609) The “consumptive demand” exception to the prohibition against importing merchandise made by convict, forced, or indentured labor under penal sanctions is repealed. This “consumptive demand” exception covers all goods, wares, articles, or merchandise mined, produced, or manufactured by such labor which are not mined, produced, or manufactured in such quantities in the United States as to meet U.S. consumptive demands.

In praxis the Commissioner of Customs, pursuant to 19 C.F.R. § 12.42, can detain the shipments of goods that are subject to “withhold release order”:

19 C.F.R. § 12.42 Findings of Commissioner of Customs.

(a) If any port director or other principal Customs officer has reason to believe that any class of merchandise that is being, or is likely to be, imported into the United States is being produced, whether by mining, manufacture, or other means, in any foreign locality with the use of convict labor, forced labor, or indentured labor under penal sanctions, including forced child labor or indentured child labor under penal sanctions, so as to come within the purview of section 307, Tariff Act of 1930, he shall communicate his belief to the Commissioner of Customs. Every such communication shall contain or be accompanied by a statement of substantially the same information

36 MOULDS, Josephine. *Child labour in the fashion supply chain*. Disponível em: <<https://labs.theguardian.com/unicef-child-labour/>>. Acesso em: 28maio2018.

37 GIRIT, Selin. *Zara shoppers find labour complaints inside clothes*. BBC News, 2017. Disponível em: <<http://www.bbc.com/news/world-europe-41981509>>. Acesso em: 28maio2018.

38 GLOBAL COMPACT. *Dez princípios do Pacto Global*. 2017. Disponível em: <<https://www.unglobalcompact.org/what-is-gc/mision/principles>>.

39 UNITED STATES OF AMERICA. *Trade enforcement and trade facilitation Act of 2015*. Disponível em: <<https://www.congress.gov/114/plaws/publ125/PLAW-114publ125.pdf>>.

as is required in paragraph (b) of this section, if in the possession of the port director or other officer or readily available to him.

Competitors, civil society, foreign bodies, other importers, domestic producers, or other interested persons can file complaints, electronically<sup>40</sup>, against those that are not complying with the rule.

19 C.F.R. § 12.42

(b) Any person outside the Customs Service who has reason to believe that merchandise produced in the circumstances mentioned in paragraph (a) of this section is being, or is likely to be, imported into the United States and, if the production is with the use of forced labor or indentured labor under penal sanctions, [...] may communicate his belief to any port director or the Commissioner of Customs. [...] the Commissioner or his designated representative will consider any representations offered by foreign interests, importers, domestic producers, or other interested persons.

When information reasonably but not conclusively indicates that merchandise within the purview of this provision is being imported from any foreign locality with the use of convict labor, forced labor, or indentured labor under penal sanctions, including forced child labor, the Commissioner of U.S. Customs and Border Protection may issue withhold release orders pursuant to 19 C.F.R. § 12.42(e). But the ban is only to the American market, the cargo can always be released for exportation.

(e) If the Commissioner of Customs finds at any time that information available reasonably but not conclusively indicates that merchandise within the purview of section 307 is being, or is likely to be, imported, he will promptly advise all port directors accordingly and the port directors shall thereupon withhold release of any such merchandise pending instructions from the Commissioner as to whether the merchandise may be released otherwise than for exportation.

If the Commissioner is provided with information sufficient to make a precise determination that the goods in question are subject to the provisions of 19 U.S.C. § 1307, are being imported from any foreign locality with the use of convict labor, forced labor, or indentured

red labor under penal sanctions, including forced child labor, the Commissioner will publish a formal finding to that effect in the Customs Bulletin and in the Federal Register pursuant to 19 C.F.R. § 12.42(f).

(f) If it is determined on the basis of the foregoing that the merchandise is subject to the provisions of the said section 307, the Commissioner of Customs, with the approval of the Secretary of the Treasury, will publish a finding to that effect in a weekly issue of the Customs Bulletin and in the Federal Register.

If in this situation importers have the opportunity to either re-export the detained shipments or to submit information demonstrating that the goods are not in violation of 19 U.S.C. § 1307.

(g) Any merchandise of a class specified in a finding made under paragraph (f) of this section, which is imported directly or indirectly from the locality specified in the findings and has not been released from Customs custody before the date of publication of such finding in the Federal Register shall be considered and treated as an importation prohibited by section 307, Tariff Act of 1930, unless the importer establishes by satisfactory evidence that the merchandise was not mined, produced, or manufactured in any part with the use of a class of labor specified in the finding.

Failing to do so the shipments subject to findings can be excluded or seized. To avoid a possible “withhold release order”, prudently importers better implement a thoroughly due diligence over their supply chains to exactly understand where and how their products are manufactured or produced in whole or in part, in order to do a proper risk assessment. Because this due diligence costs money, the decision to implement it will depend, inter alia, on (i) whether suspect goods can always be re-exported; and on (ii) who bears any loss (for example, the importer can make a deal with his supplier that the supplier get paid only if the good passes US customs, with such a deal, the importer has much less reason to do due diligence.

The practical affect of the first withhold release orders made in regards to forced labor in over a decade in America, was on Chinese companies. The actual claims were over imported soda ash, calcium chloride, caustic soda, and viscose/rayon fiber that were made by forced convict labor and imported potassium, potassium hydroxide, potassium nitrate that was believed to be mined and manufactured using convict labor<sup>41</sup> and stevia

40 UNITED STATES OF AMERICA. *Customs and border protection e-Allegations portal*: official United States Government system, which may be used only for authorized purposes: the government may monitor and audit usage of this system, and all persons are hereby notified that use of this system constitutes consent to such monitoring and auditing. Disponível em: <<https://eallegations.cbp.gov/Home/Index2>>.

41 HAMPSEY, Meghan. *CBP enforces the ban on goods produced with forced labor with two withhold release orders*: human rights first. Disponível

and peeled garlic cultivated using convict labor.

So far the measure has been used only to curtail the “China Syndrome”<sup>42</sup>: rising China imports causing higher unemployment, lower labor force participation, and reduced wages in local American markets. U.S. Immigration and Customs Enforcement (ICE) agents have not been permitted to make site inspections in China since 2009, and Chinese officials deny the suspected forced labor, although they maintain a network of prison labor facilities<sup>43</sup>.

## 6. ENVIRONMENTAL, SOCIAL, AND GOVERNANCE

Going beyond the bilateral US-China trade relationships, because of the American law studied above, there is a risk that imported products from any country be excluded from the USA market because they are made with forced labor. This regulation may incentive companies to apply due diligence standards into their own subsidiaries and to require similar third-party certifications. Because of these characteristics, Environmental, Social, and Governance (ESG) reporting has become an increasing part of business strategy. Defining the right indicators to use in the company and in a sector, promoting stakeholder engagement, and enhancing the social environmental policies have become essential to achieve the long-term sustainability of the business enterprises, avoiding litigation costs and reputational risks that could eventually even compromise the finance performance of an enterprise.

According to WWF/ISEAL, what makes a standard system reliable is: 1) transparency; 2) a multistakeholder participation process, involving “the entire supply chain from businesses, civil society, governments, research institutions and NGOs, with balanced decision-making”; 3) independent verification by third party auditors or certification body; and 4) continuous im-

provement<sup>44</sup>. To multi-nationals, because they have to manage their production globally, there is a consistent increase in the demand for reliable standards, especially for accessing the impact their investments have. This is the conclusion the GIIN report of 2017 that also shows that 60% of the investors “actively track their financial performance of their investments with respect to sustainable development goals or plan to do so soon”<sup>45</sup>.

This is seriously collected information, not just propaganda of firms saying that they are concerned and are monitoring, when in practice they are not. This investor survey is based on an analysis of the activities of 209 of the world’s leading impact investing organizations, including fund managers, foundations, banks, development finance institutions, family offices, pension funds, and insurance companies. The surveyed represent a pool of impact investing assets nearly USD 114 billion.

Impact investments are investments made into companies, organizations, and funds with the intention to generate social and environmental impact alongside a financial return. Impact investments can be made in both emerging and developed markets, and target a range of returns from below market to market rate, depending on investors’ strategic goals. The growing impact investment market provides capital to address the world’s most pressing challenges in sectors such as sustainable agriculture, renewable energy, conservation, microfinance, and affordable and accessible basic services including housing, healthcare, and education.<sup>46</sup>

Social environmental sustainability standards can vary widely especially on the level of performance they require, some are low-bar, easy to achieve, and therefore often used as a measure of only appearing sustainable without actually committing and applying the efforts needed to become really more sustainable; this kind of disguise is called ‘greenwash’<sup>47</sup>. This disguise practice

em: <<https://www.humanrightsfirst.org/blog/cbp-enforces-ban-goods-produced-forced-labor-two-withhold-release-orders>>. Acesso em: 28maio2018.

42 AUTOR, David H.; DORN, David; HANSON, Gordon H. The China syndrome: local labor market effects of import competition in the United States. *American Economic Review*, v.103, n.6, p.2121–2168, 2013.

43 BOWE, Alexander. *U. S. exposure to forced labor exports from China developments since the U.S. trade facilitation and trade enforcement Act of 2015*. USA, 2017. Disponível em: <<https://www.uscc.gov/sites/default/files/Research/Forced%20Labor%20Report.pdf>>.

44 WWF/ISEAL. *SDGs mean business: how credible standards can help companies deliver the 2030 agenda*. New York: WWF/ISEAL, 2017. p. 15. Disponível em: <<http://www.standardsimpacts.org/resources-reports/wwfiseal-report-sdgs-mean-business-how-credible-standards-can-help-companies>>. Acesso em: 18maio2017.

45 MUDALIAR, Abhilash et al. *Annual Impact Investor Survey 2017*. Global Impact Investing Network, 2017. p. 15. Disponível em: <<https://thegiin.org/knowledge/publication/annualsurvey2017>>. Acesso em: 31maio2017.

46 GLOBAL IMPACT INVESTING NETWORK. *2017 Annual Impact Investor Survey the Global Impact Investing Network (GIIN)*. UK, 2017. Disponível em: <[https://thegiin.org/assets/GIIN\\_Annual-ImpactInvestorSurvey\\_2017\\_Web\\_Final.pdf](https://thegiin.org/assets/GIIN_Annual-ImpactInvestorSurvey_2017_Web_Final.pdf)>.

47 LYON, Thomas P.; MONTGOMERY, A. Wren. The means and end of greenwash. *Organization & Environment*, v.28, n.2, p.223–



can have a negative backlash on the reputation of the company using this trick. Another kind of standards is the high-bar type, which can be very demanding. Some focus on preventing worst corporate practices, others establish rigorous improvement pathways to be followed in order to achieve good governance.

The effective impact a standard can have on driving the companies to a more sustainable path, depends a lot on the qualities accessed, the process of compliance and the due diligence mechanisms. But also the external reading of the standard is very important. Because how consumers and other stakeholders value that standard is directly related with the ability of it providing incentives and mobilizing investments of the actors within the supply chains. The improve in the performance come from being seeing as a better quality player, this can provide enhanced market access, better contract terms and, very often, a direct price premium to producers (better products can cost more).

Some initiative have long worked on setting good examples this is the case of OECD Guidelines and Business and Human Rights Grievance Mechanism deals with labor standards, human rights, environment, bribery, etc. The OECD Guidelines for Multinational Enterprises<sup>48</sup> incorporates ILO core labor standards<sup>49</sup> and the UN Guiding Principles on Business and Human Rights<sup>50</sup>. It can provide a due diligence guidance and have an increasingly important role in helping businesses to implement these standards to global value chains.

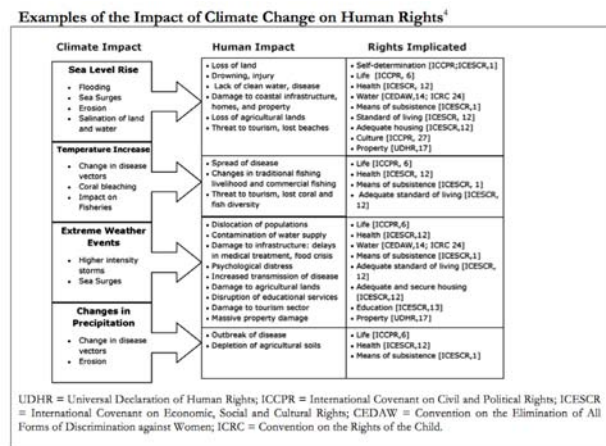
The grievance mechanism is globally available covering global value chains with a link to companies from any of the 48 adherent governments. [...] Between 2011 and 2016, more than 50% of all complaints brought, accepted for further examination and closed resulted in agreements between the parties. [...] Concrete results were, for example, achieved regarding implementing systems to end forced and child labor in garment supply chains, improving health and safety for agricultural workers, enhancing human rights due diligence for sport mega-events, and arranging compensation for

indigenous people.<sup>51</sup>

Oriented by these guidelines, governments have various tools to incentivize companies to behave responsibly, notably through export credits and trade support diplomatic missions. Export credit agencies can withdraw support for companies in foreign markets as a penalty for irresponsible corporate behavior. Institutional investors, such as pension funds and sovereign wealth funds, can also have a significant potential to use finance to promote better business behavior amongst their investee companies. And increasing quantity of institutional investors demands investment approaches that consider ESG factors.

Beyond the due diligence responsibility and the economic long-term perspective, governing the ESG becomes an practical tool to manage human rights in a broad sense. Sébastien Jodoin and Katherine Lofts illustrate how for example Economic, Social, and Cultural Rights are interdependent with Climate Change<sup>52</sup>:

**Figure 1 - Social environmental measures and Human Rights**



Source: Yale, 2013

The necessity of measuring the environmental, social governance stimulated many initiatives to assess, report and manage those criteria. The Global Initiative for Sustainability Reporting<sup>53</sup> for example aggregates

249, 2015.

48 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *OECD guidelines for multinational enterprises*. Paris: OECD, 2011. Disponível em: <<http://public.ebib.com/choice/publicfullrecord.aspx?p=797696>>. Acesso em: 27maio2018.

49 INTERNATIONAL LABOUR OFFICE. *Labour standards*. Disponível em: <<http://www.ilo.org/global/standards/lang-en/index.htm>>. Acesso em: 27maio2018.

50 HUMAN RIGHTS COUNCIL. *Guiding principles on business and human rights: implementing the United Nations 'Protect, Respect and Remedy' Framework*. 2011.

51 NIEUWENKAMP, Roel. *Crash course Nieuwenkamp Responsible Business OECD*. 2018. Disponível em: <<https://www.youtube.com/watch?v=ZFz2Hv4X90I&feature=youtu.be>>. Acesso em: 27maio2018.

52 ODOIN, Sébastien; LOFTS, Katherine. *Economic, social, and cultural rights and climate change: a legal reference guide*. New Haven, CT: CISDL, GEM & ASAP, 2013. p. 5.

53 GRI. *Global Reporting Initiative*. Disponível em: <<https://www.globalreporting.org/Pages/default.aspx>>. Acesso em: 27maio2018.



many ratings that become products, targeting the investor audience. But the focus of these products have been the environment and governance aspects, leaving behind important social aspect as points out a NYU Stern report: “of the 580 ratings products aggregated by the Global Initiative for Sustainability Reporting, 97% of environmental efforts and 80% of governance efforts target 18 investors as the primary audience. When it comes to social efforts, only 14% similarly targeted investors.”<sup>54</sup>

Reliably measuring the effectiveness of the company actions and comparing the ESG performance of companies is still something to be improved. This reveals the demand for more empirical research about the concrete results of specific actions adopted by the companies and a further integration of social environmental sustainability into the strategic planning process. But this broader approach would concretely accelerate the necessary change in the current production patterns. And private or national like the American about forced labor can provide incentives to the implementation of ESG initiatives.

## 7. HUMAN RIGHTS AND METHODOLOGY OF ASSESSMENT

There is an intrinsic tension between moral ambitions as they were presented in the language of human rights declaration and treaties and how it is presented in the language of compliance reports and development goals. The traditional human rights discourse suggests that deprivations must be ended right away with top-priority remedial attention, while the metrics of reports and goals invite an incremental approach to overcoming deprivations. Because there is a certain follow up list or a set of measures to take, toward the objective the approach to it is step-by-step.

The development goals discourse invites a diachronic, incremental approach: we gradually reduce severe deprivations over several decades. The human rights discourse, by contrast, brooks no such delay. Once we recognize a human right not

to be enslaved, we must not make a 25-year plan aiming to halve the number of slaves or aiming to reduce floggings by half. Once we recognize a human right not to be exterminated, we must not make a 25-year plan to halve the killing rate at Nazi concentration camps. Once we recognize a human right not to be subjected to economic institutions under which hundreds of millions foreseeably and avoidably cannot meet their basic needs, we must not make a 25-year plan to reduce these severe deprivations by 27% but must initiate the necessary institutional reforms right away.<sup>55</sup>

Putting this way it is clear that is a problem of moral evaluation notwithstanding the efforts of the official incremental discourse to decline to tackle this issue explicitly this way. By contrast implicitly the current analyses often require assuming that it is “conceivable to separate the description of social events and their moral and political evaluation”<sup>56</sup>, although it is impossible to reach value-neutral descriptions in legal analyses and quasi-natural characteristics in a society. Performing this type of culture-based assessment represents a major hurdle to the effective implementation of human rights and sustainable development goals. It can conceal that the widespread practice of creating numerical indexes and rankings to assess legal performance serve to qualify, and rank, making it easier to simplify the comparison of often complexly unequal realities.

Another challenge of the use of incremental metrics is that the division of responsibilities can be done unfairly, saddling the weakest links at the supply chain, forcing the least capable companies and countries with the largest responsibilities and costs, eventually even expelling poor players from the market. There is no doubt that companies of any size using forced labor must be expelled from market. But stringent compliance rules can raise the cost of production, creating a minimal investment threshold. So ethical small companies may face the situation that they cannot compete with wealthier ones and lose their foreign customers because they do not have the means to document that their production is free of forced labor.

In other words the conformity cost of a private

54 LABOWITZ, Sarah; O’CONNOR, Casey. *Putting the “S” in ESG: measuring human rights performance for investors*. New York: NYU Stern Center for Business and Human Rights, 2017. p. 8. Disponível em: <<https://static1.squarespace.com/static/547df270e4b0ba184dfc490e/t/58cad912e58c6274180b58b6/1489688854754/Metrics-Report-final-1.pdf>>.

55 POGGE, Thomas; SENGUPTA, Mitu. Assessing the sustainable development goals from a human rights perspective. *Journal of International and Comparative Social Policy*, v.32, n.2, p.83–97, 2016.

56 NASSER, Salem Hikmat; GHIRARDI, José Garcez. Around the pyramid: political-theoretical challenges to law in the age of global governance. *Revista de Direito Internacional*, v.15, n.1, 2018. Disponível em: <<https://www.publicacoes.uniceub.br/rdi/article/view/4934>>. Acesso em: 28maio2018.

standard for example can push the less wealthy companies out of a market if major clients or governments require these standards where the company intends to export to. And the imposition of no-forced-labor standards will raise the price of the product supplied, some companies will pick up the business of supplying the relevant product, and these companies will employ workers that are better treated than the forced laborers were treated before, creating then a virtuous cycle of curbing social and environmental dumping.

This type of unfair commercial practice is characterized by the advantages of lower price competitors acquire by illicitly lowering wages, reducing employees' benefits and avoiding sustainable practices. But deciding if a practice is this kind of dumping can be challenging. Like the 1990's discussion about inclusion of the social clause in the international trade regulation, it can reflect a "hypocritical drive to legislate a particular morality"<sup>57</sup> once the fight against low wages can disguise protectionism measures. Under the flag of protecting low wages workers interests, rich countries can block the access to their market to companies from developing countries.

Undoubtful the social environmental dumping is a problem, especially because the international capital flows tend to take advantages of convenient or unregulated countries. But not every export from country that has lower standards for labor rights and environmental protection gain an unfair advantage. And the asymmetries of the level of protection worldwide do not intrinsically force all countries to lower their standards in a "race to the bottom"<sup>58</sup> otherwise countries should be prevented to invest abroad and only trade with those that have similar labor and environmental standards.

But in this sense until what point national governments and transnational private policies can take measures to put pressure on other countries and companies to comply with their internal standards? On the one hand, there is the need to improve workplace conditions and the international legal coherence. On the other hand, it is the risk of protectionism that industrial nations pres-

sure to raise standards to undermine the comparative advantage of lower wage trading partners, curtailing their economic development possibilities by hampering their ability to trade with mature markets. And at an extreme, some demanded standards could be too high for countries and companies to meet at their low level of development.

This inclusively is one example of difficulty of using one size fits all moral choice. The universal zero target approach for all economic and social human rights obligations is hard to work with also because of these controversies. Its not about defending that certain businesses employing forced labor should be allowed to continue to do so, but about recognizing a dialectic political decision behind the definition of what is forced labor.

Historically unfairly excessive expectations had been imposed upon the poorest. The international legal framework reflect that by avoiding the traditional idealist approach, and turning to the principle of common but differentiated responsibilities, which states that human rights and sustainable development goals should be made relevant to all countries, but that the roles and responsibilities in the implementation of them should be differentiated according to the different national realities, capacities and levels of development of different countries and also according to national policies and priorities. This in the climate accord<sup>59</sup> for example led to the inclusion of nationally determinable targets.

Global enterprises, given their wealth and influence, ought to be taking the lead in providing the needed resources for adaptation of their global supply chain, for example, by improving the management and the data collection in their subsidiaries. National government can encourage this international capacity building besides economic growth mechanisms and charitable activities. Legal initiatives like the end of the consumptive demand clause by the Trade Enforcement and Trade Facilitation Act of 2015 can in a way instill these results.

If the world's most influential agents had been held sufficiently accountable for what they owe toward making sustainable development work, the concepts of partnership and universalism would have been more meaningful, rather than what they are now likely to be-

57 LAL, Deepak. Social standards and social dumping. In: *Merits and limits of markets*. Berlin: Springer; Heidelberg, 1998. p.255-274. Disponível em: <[https://link.springer.com/chapter/10.1007/978-3-642-72210-3\\_11](https://link.springer.com/chapter/10.1007/978-3-642-72210-3_11)>. Acesso em: 28maio2018.

58 WTO. *Understanding the WTO labour standards*: highly controversial. Disponível em: <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey5\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm)>. Acesso em: 28maio2018.

59 UNITED NATIONS. *Acordo de Paris*. 2015. Disponível em: <<https://treaties.un.org/doc/Publication/UNTS/No%20Volume/54113/A-54113-China-080000028047bf86.pdf>>.

come: a smokescreen for extreme global inequalities.<sup>60</sup>

The international assistance discourse is heavily focused on global economic growth and in charitable inflows. But it can represent business opportunities. Growth itself has limits, causes environmental negative externalities and poses threats to the realization of human rights. But an articulated international legal system can quantify the negative impacts and force them into the production price. In this context private sector is part of the solution by gaining profits with the green economy

[...]green economy is the economy that results in improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcity. [...] The development path must maintain, enhance and, where possible, rebuild natural capital as a critical economic good and as a source of public benefits, especially for the needy population [...] In a green economy, income and employment growth must be driven by public and private investments that reduce carbon emissions and pollution and increase energy and resource use, and prevent losses of biodiversity and ecosystem services. These investments need to be generated and supported by specific public spending, policy reforms and regulatory changes. The development path must maintain, enhance and, where possible, rebuild natural capital as a critical economic good and as a source of public benefits, especially for the needy population whose livelihood and security depend on nature.<sup>61</sup>

The greatest legal challenge, therefore, is to identify these ideological synergetic contents in search of complementarity, to promote: economic development with social and environmental responsibility. In addition to being low-carbon this new economic paradigm needs to take into account planetary boundaries and the principle of equity. In practice, this corresponds to maintaining a significant level of growth for poor countries, intermediate level of growth for emerging countries and close to zero level of growth for developed societies. Overcoming the deficits through a decrease in the inequality is the key point then.

## 8. CONCLUSION

60 POGGE, Thomas; SENGUPTA, Mitu. Assessing the sustainable development goals from a human rights perspective. *Journal of International and Comparative Social Policy*, v.32, n.2, p.83–97, 2016.

61 UNITED NATIONS ENVIRONMENT PROGRAMME. *Towards a green economy: pathways to sustainable development and poverty eradication*. Nairobi: UNEP, 2011. p. 2.

Responsible business conduct is no longer voluntary in the sense of being optional, even though it is still not legally binding. There is an increased uptake of corporate responsibility and due diligence standards in legal instruments like the example studied here. In fact, legal or commercial consequences increasingly become applicable to the non-observance of due diligence measures. On this path, greater coherence is needed regarding international and national policies, especially by offering businesses incentives to comply with ESG and by attaching greater consequences to irresponsible business behavior.

Governments have a variety of different tools at their disposal to promote responsible business and to lead by example through economic diplomacy instruments, public procurement, state-owned enterprises, and trade and investment policies. Solution oriented legal studies have to coordinate these diverse options in their interdependent dimensions. Scholars and practitioners focusing only on the static dimension of principles of human rights and sustainable development goals are insufficiently exploring their capacity to change, when their work should promote the dialogue across divides in the business and human rights field in order to be able to push the creation of new norms, and practices complying with standards and improving corporate compliance.

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## APPRECIATION MESSAGE

I am grateful to colleagues at the Yale University who provided partnership and feedback on initial drafts of this paper, in particular 马晓燕 (Emma Maxiao Yan), Albane Mercat, Frédéric Piguet and Pamela Chiara. I also would like to express my great appreciation for the more recent comments and guidance from Leitner Professor of Philosophy and International Affairs at Yale University Dr. Thomas Pogge who provided helpful insights when I first conceptualized this research project and after helped me by discussing the ideas and suggesting clarifications, without his orientation this paper would be impossible. All errors and opinions are my own.